In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 937

ANDERSON CHARLES, PETITIONER

v.

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. In June 1966, petitioner was demoted from foreman to distribution clerk in the main Chicago post office because of his repeated failure to obey orders, his disregard for established policy in the administration of the leave program and his failure to administer the leave program with due regard for the needs of the service. The decision to demote was not made until petitioner had been notified in writing of the factual foundation underlying the charges against him and had been given an opportunity to reply.

At petitioner's request, the regional office of the Department conducted a hearing at which both peti-

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tioner and the Department produced witnesses. Upon completion of the hearing, the regional office upheld the demotion. After reviewing all of the evidence, the Civil Service Commission's Board of Appeals and Review found that the record fully supported the Department's charges against the petitioner and accordingly upheld the Department's action.

Petitioner then filed this action in the district court seeking, *inter alia*, a new administrative hearing to enable him to crossexamine one Douglas Laskey. A witness at the Department hearing had testified about a conversation the witness had had with Laskey, who was not a witness. The district court granted the government's motion for summary judgment and the court of appeals affirmed, on the ground that neither petitioner nor his representative had made any request that Laskey be produced for confrontation and crossexamination.

2. Since Laskey was not called by either side to testify and was not present at the hearing, petitioner's contention that he was not permitted to crossexamine Laskey is, in reality, an objection to the fact that Laskey was not produced by either side. In *Williams* v. *Zuckert*, 371 U.S. 531, this Court held that the party desiring the presence of certain witnesses at an administrative hearing bears the "initial burden" of producing them. If he has failed to do so, he cannot complain that they were not produced by the agency. In this case, petitioner neither attempted himself nor asked the Department to secure Laskey's presence. If the opportunity to question Laskey was

crucial, as is now belatedly contended, an objection should have been raised at the hearing at the time the hearsay evidence was introduced and a postponement should have been sought to locate Laskey. Neither petitioner nor his representative at the hearing objected to the evidence or sought a postponement.

Petitioner also argues that 5 C.F.R. 771.216, as in effect at the time of the hearing, did not indicate that an employee, as well as the agency, was entitled to produce witnesses. Petitioner's reliance on this argument, however, is inconsistent with the fact that he presented other witnesses at the agency hearing. Moreover, even if the regulation relieved him of the "initial burden" of producing witnesses established in *Williams* v. *Zuckert, supra,* he was obligated to object to the evidence when introduced and to request the Department to produce Laskey for crossexamination. There is no basis for petitioner's assertion (Pet. 8) that the Department would not have produced Laskey on request.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970